77-1466

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 76-1843

FREDERICK N. BOSWELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

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I N D E X

TABLE OF AUTHORITIES CITED

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Frederick Newell Boswell, the Petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on March 15, 1978.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at ____ F.2d ____, No. 76-1843 (5th Cir., January 12, 1978) and is printed in Appendix A, infra, p. 17. The judgment of the United States Court of Appeals for the Fifth Circuit is printed in Appendix B, infra, p. 24. No opinion of the United States District Court for the Southern District of Mississippi is reported.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit (Appendix B, infra, p. 24) was entered on January 12, 1978. A timely petition for rehearing was denied on February 15, 1978 (Appendix C, infra, p. 25). Pursuant to a finding that "through inadvertence, the attorney for Frederick Newell Boswell was not notified of the affirmance [by the United States Court of Appeals for the Fifth Circuit] or the Surrender Order," the United States District Court for the Southern District of Mississippi ordered stay of the surrender order (Appendix D, infra, p. 26) on March 14, 1978, and the United States Court of Appeals

recalled and stayed its mandate to and including April 15, 1978, pending filing of petition for writ of certiorari in the Supreme Court of the United States (Appendix E, infra, p. 27) on March 27, 1978. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. WHETHER THE DELEGATION BY THE TRIAL JUDGE OF THE AUTHORITY TO SUPERINTEND THE TRIAL DURING CLOSING ARGUMENT TO A UNITED STATES MAGISTRATE WHO HAS NOT FAMILIARIZED HIMSELF WITH THE RECORD OF THE TRIAL VIOLATES THE DEFENDANT'S SIXTH AMENDMENT RIGHT TO A JURY TRIAL?

2. WHETHER A RIGHT TO SUPERINTENDENCE BY AN OFFICIAL FAMILIAR WITH THE RECORD OF THE TRIAL UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION IS AMONG THOSE RIGHTS THAT ARE SO BASIC TO A FAIR TRIAL THAT THEIR INFRACTION CAN NEVER BE TREATED AS HARMLESS ERROR?

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

This case involves the Sixth Amendment to the United States Constitution, providing as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

and also involves Federal Rules of Criminal Procedure, Rule 25(a), providing as follows:

> If by reason of death, sickness or other disability the Judge before whom a jury trial has commenced is unable to proceed with the trial, any other judge regularly sitting in or assigned to the court, upon certifying that he has familiarized himself with the record of the trial may proceed with and finish the trial.

STATEMENT OF THE CASE

Facts

This criminal action was commenced by the United States of America, in the United States District Court for the Southern District of Mississippi against Petitioner, Frederick Newell Boswell. Petitioner was charged with violations of 18 U.S.C. §371, Mail Fraud, and 18 U.S.C. §1341, Fraud by Wire, and 18 U.S.C. §1343, Fraud by Wire.

After a five-day presentation of evidence, the presiding judge became ill. After determining that counsel had no objection, but without informing the Petitioner or obtaining a waiver from him, the judge directed a United States Magistrate to preside over the trial during the closing arguments. The magistrate introduced himself to the jury and explained his presence there, but did not first familiarize himself with the record of the trial proceedings nor make any other effort to become familiar with the proceedings during the five (5) days of trial.

During the course of the subsequent arguments to the jury, counsel for the Petitioner made numerous objections to the argument of the United States Attorney. Many of these objections were based on a belief that the United States Attorney was misquoting testimony. The transcript reveals six (6) instances of objections. The Magistrate's reaction to those objections was, on the first occasion, to point out that it was hard for him to rule when he had not been present during the trial and then to direct the United States Attorney to confine his argument to the testimony. On the next

occasion, he asked the United States Attorney whether the evidence in fact showed what he had just argued, but that was his only response and the prosecutor did not reply. On the next occasion, he directed the defense attorney to read a portion of the transcript that related to the argument that the defense attorney had just objected to. On the next occasion the defense attorney objected to a portion of the U. S. Attorney's argument that appeared to place the burden of proving certain factual matters upon the defendant. The Magistrate's response to that objection was to point out that the U. S. Attorney was on closing argument. The next objection, based on an inaccurate statement of the testimony, prompted the Magistrate to ask whether he thought that they now had the facts straight. The final objection was met by the response that the defense attorney had made his argument to the jury and that "we are now on closing argument." In none of the instances did the Magistrate presiding over the closing argument make any attempt to seek a ruling from the judge who had presided during the testimony, nor did he give any indication that anyone other than

he was in fact in charge of presiding during the closing argument.

Following the closing arguments, the judge who had presided during the course of the testimony returned to the bench and instructed the jury. After deliberation, the jury found the Petitioner Boswell guilty on all three (3) counts. The case was appealed to the United States Court of Appeals for the Fifth Circuit, which entered judgment on January 28, 1978, affirming the conviction of the defendant on all counts, but was remanded for resentencing on a probationary sentence made conditional upon a restitution of a sum to be determined by a probation officer. (That portion of the judgment is not at issue in this petition.)

The Rulings Below

The District Court refused a motion by the defendant for a new trial on the grounds that the United States Magistrate had sat improperly during the closing arguments to the jury.

The Court of Appeals, on the issues presented in this petition, apparently held that, although the

substitution of the Magistrate for the judge was clearly in violation of Rule 25(a) of the Federal Rules of Criminal Procedure for the United States Magistrate to proceed during the closing arguments, invasion of a constitutionally guaranteed right, that in this case there was nothing prejudicial in the use of the magistrate and "that beyond a reasonable doubt lack of conformity in this instance was harmless error." The court expressly disclaimed deciding whether the occurrence was a violation of the petitioner's Constitutional rights. A concurring opinion by Circuit Judge Tjoflat argued that the error was constitutional but was not fundamental to a fair trial and, therefore, could be found to be harmless error if it were found so to be beyond reasonable doubt. The Circuit Court later refused a timely motion for rehearing, but stayed the mandate pending determination of this petition.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED TO PERMIT DETERMINATION OF THE CONSTITUTIONAL DIMENSIONS OF THE USE OF UNITED STATES MAGISTRATES IN DISTRICT

COURT TRIALS AND TO EXPLORE THE LONG-NEGLECTED QUESTION OF THE DIMENSIONS OF THE SIXTH AMENDMENT RIGHT TO TRIAL BY JURY.

Although, as has been conceded at each level of this action, the substitution of a United States Magistrate for the United States District Court Judge was improper under Federal Rule of Criminal Procedure 25(a), the issue raised in this petition is not based on the lack of authority for the Magistrate to act. In fact, the issue is believed to be of importance precisely because of the apparent need to explore the use of the Magistrate in situations involving trials in the United States District Courts and in which the U. S. magistrate might be helpful. This case presents an opportunity to map the area in which United States magistrates could serve and what qualifications they would need to satisfy in order to serve in ways exemplified by the use of the United States Magistrate in this case (assuming that rules were to be adopted which would permit their use consistent with the requirements of the United States Constitution).

Therefore, the central issue raised in this petition is whether a United States magistrate, or

anyone else who might be authorized by law to sit in place of a presiding U. S. District Court judge, could constitutionally do so without having familiarized himself with the record of the prior trial proceedings.

The only federal case which has addressed this issue is Traction Company v. Hof, 174 U.S. 1 (1899), held that the phrase "trial by jury" as used in the Sixth Amendment to the United States Constitution encompasses a requirement that the "trial be in the presence and under the superintendence of the judge empowered to instruct them on the law and to advise them on the facts." The court there observed that the "proposition has been so generally admitted, so seldom contested, that there has been little occasion for its distinct assertion," and that status has not changed. In the seventy-nine (79) years since he Hof decision, that statement has never been questioned or overruled.

The facts in this case make clear that the situation in which the United States magistrate worked during this trial was not one where the Magistrate was temporarily present and merely exercising superintendence of the trial as an agent of the United States District

Court judge. Rather, the Magistrate was himself superintending the trial during the period of the judge's absence, as reflected by the fact that he did not attempt to seek the judge's assistance when he was called upon to rule on objections during the course of the closing argument.

Thus, the issue raised here is not the more common one of the effect of the failure of a presiding judge to be present during a portion of the trial, but rather one of superintendence by a person who has not prepared himself properly to superintend the trial. The issue is substantially different than that reflected in U. S. v. Pfingst, 477 F.2d. 177 (Second Cir., 1973), or Haith v. United States, 342 F.2d. 158 (Third Cir., 1965), in which the issue was the effect of the absence from the courtroom of the trial judge during a portion of the trial, even though the lack of physical presence did not prevent his continued superintendence of the trial.

The only case since Hof which addresses this issue is Freeman v. United States, 227 Fed. 732 (Second Cir., 1915). The question in that case was

whether a defendant could consent to one judge's being substituted for another in a criminal trial. The court held that the defendant could not consent to the substitution, and that his trial in which the substitution had occurred was erroneous. Although the holding of that case has, of course, been undermined by the subsequent holding that the right to a trial by jury may be waived by a defendant, Patton v. United States, 281 U.S. 276 (1930), the implicit holding of Freeman that the right to superintendence by a trial judge is on the same footing with the right to a jury itself has not been undermined.

That the issue raised in this petition is of constitutional dimension is also made clear by the reaction to the proposed federal rule, now embodied as Rule 25 of the Federal Rules of Criminal Procedure, when the rule authorizing substitution was being considered. The United States Supreme Court at that time raised the question "Has it been considered whether this rule is constitutional and in any case whether the policy which might admit of its use in civil cases should be extended to criminal cases?"

Cited in Orfield, Disability of the Judge in Federal Criminal Procedure, 6 ST. LOUIS UNIVERSITY LAW JOURNAL 150, 151 (1960). This reaction suggests, although it has, of course, never been decided, that Rule 25 establishes minimal Constitutional standards for the substitution of one judicial official for another during a criminal trial. If the requirement of familiarity with the preceedings is not met, the defendant is deprived of the superintence required by the Sixth Amendment to the United States Constitution.

II.

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER THE HARMLESS ERROR RULE FOR CONSTITUTIONAL ERROR MAY BE EXTENDED TO A VIOLATION OF THE SIXTH AMENDMENT RIGHT TO TRIAL BY JURY.

Since the doctrine of harmless constitutional error was first enunciated in Chapman v. United States, 386 U.S. 18 (1967), it has been widely accepted that, as stated in Chapman, "There are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error."

It now appears clear that harmless constitutional error may occur with respect to prosecutorial comment upon a defendant's failure to take the stand, Chapman

v. United States, 386 U.S. 18 (1967) (dictum), the admission of co-defendants' statements in violation of the Bruton rule, Harrington v. California, 395 U.S. 250 (1969), the admission of an unconstitutionally obtained post-indictment confession, Milton v. Wainwright, 407 U.S. 371 (1972), the admission of evidence obtained by an unconstitutional search and seizure, Chambers v. Maroney, 399 U.S. 42 (1970), the admission of eyewitness identification derived from a lineup at which the right to counsel is denied, U.S. v. Wade, 388 U.S. 218 (1967), and the denial of right to counsel at a preliminary examination, Coleman v. Alabama, 339 U.S. 1 (1970).

None of the decisions specifying that constitutional error could be harmless error deal with the question of any right related to the Sixth Amendment right to a trial by jury. This case affords an opportunity to consider the harmless error doctrine as applied to the right to trial by jury.

Petitioner submits that the harmless error doctrine cannot apply to the right to trial by jury or, more specifically, that portion of the right to

trial by jury which guarantees a criminal defendant the superintendence of a judicial official familiar with the proceedings in the case.

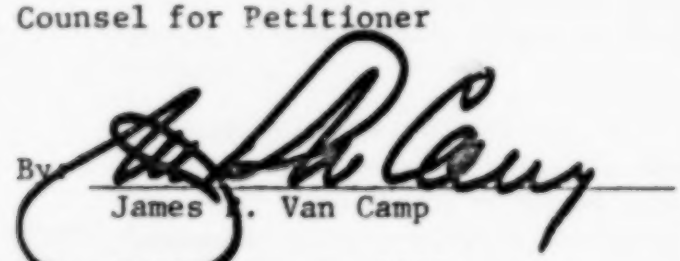
The harmless error doctrine appears to be aimed either at instances in which the constitutional error alleged involves the admissibility of evidence or otherwise does not directly involve the established truthfinding mechanism of a trial. The petitioner submits that when the issue is one of failure to have a judicial official familiar with the record superintending trial, there is no opening to raise the question of whether it would have made a difference had that judge been there. Instead, superintendence by an official familiar with the case is so fundamental to the entire concept of the trial that the possibility of its harmlessness can no more be raised than could the possibility of the harmlessness of a defendant's being tried without a jury when he had not waived jury or the possibility of the harmlessness of a defendant's being tried without the ability to cross examine.

CONCLUSION

WHEREFORE, petitioner respectfully prays that a writ of certiorari by granted.

VAN CAMP, GILL & CRUMPLER, P. A.

Counsel for Petitioner



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UNITED STATES of America, Plaintiff-Appellee,

v.

Frederick Newell BOSWELL, David Rule Nichols and Emmett Howard Herndon, Defendants-Appellants.

No. 76-1843.

United States Court of Appeals, Fifth Circuit.

Jan. 12, 1978.

Defendants were convicted before the United States District Court for the Southern District of Mississippi, William Harold Cox, J., of mail fraud and conspiracy to commit mail fraud and fraud by wire, with one defendant also being convicted of wire fraud, and they appealed. The Court of Appeals, Coleman, Circuit Judge, held that: (1) although it was error to permit magistrate to sit during four hours of scheduled jury argument when the presiding judge became ill, such error was harmless where objections chiefly were to effect that prosecutor was misquoting testimony and magistrate informed jury that since they had heard the testimony they were the judges of whether it was accurately quoted and (2) probation could be condition only on defendant's reimbursing defrauded depositors for their actual loss.

Affirmed in part and remanded in part.

Tjoflat, Circuit Judge, concurred specially and filed opinion.

1. Criminal Law ⇐1165(1)
Judges ⇐25(1)

When trial judge became ill it was error to permit magistrate to sit during the scheduled four hours of jury argument; however, error was harmless since defendants were not prejudiced in that objections mainly went to effect that prosecutor was misquoting testimony and magistrate, who had not heard the evidence, informed jury that since they had heard the testimony they were the judges of whether it had accurately been quoted. Fed.Rules Crim.Proc. rule 25(a), 18 U.S.C.A.

2. Criminal Law ⇐982.5(1)

As a condition of probation the district court has authority to require a defendant to make restitution to injured parties for actual loss or damage caused by the offense for which he stands convicted. 18 U.S.C.A. § 3651.

3. Criminal Law ⇐1184(4)

Probation imposed following conviction of mail and wire fraud was to be conditioned on restitution only for actual loss to defrauded depositors of mortgage and loan company; hence, correction of sentence was required where it provided that probation was contingent on defendant paying full amount of invested funds within 60 days since state receivership was still in progress and receiver was possessed of a substantial sum. 18 U.S.C.A. §§ 1341, 1343, 3651.

4. Criminal Law ⇐772(6)

Refusal to instruct that good faith was a defense to each count of mail and wire fraud involving mortgage and loan company which defendants established on expanding North Carolina operations into Mississippi was not error where defendant's trial evidence as to good faith went only to conduct in formation and operation of the North Carolina operation and the indictment charged fraud

solely with respect to operation of the Mississippi institution. 18 U.S.C.A. §§ 871, 1341, 1343.

Appeals from the United States District Court for the Southern District of Mississippi.

Before COLEMAN, SIMPSON and TJOFLAT, Circuit Judges.

COLEMAN, Circuit Judge.

The actors in the course of conduct which resulted in the convictions hereinafter described were Frederick Newell Boswell, Emmett Howard Herndon, David Rule Nichols, and Robert Doran.

During 1973, Boswell had been operating a company in North Carolina called Pinehurst Mortgage and Loan Company. Pinehurst solicited investments from the public and used the funds so derived to acquire real estate and mortgage holdings. The money deposited was represented by promissory notes to be repaid at a certain time with interest. Deciding to expand his operations, Boswell enlisted the assistance of Herndon and Doran. Herndon had previously helped Boswell set up Pinehurst, but Doran was inexperienced in the mortgage and loan business. Mississippi and Louisiana were chosen for expansion, primarily because of the exemption of promissory notes from state securities regulations. Doran was to work in Mississippi and Herndon in Louisiana.

Doran came to Mississippi and, with Herndon's help started Jackson Mortgage. Nichols, office manager of Pinehurst, gave Doran false credit references and other advice to help him get started. After the necessary incorporation was completed and an advertising format worked out, Boswell came to Mississippi to inspect what had been accomplished. Liking what he saw, Boswell had $5,000 wired from a Pinehurst account to Doran for expenses. Boswell had decided it would take $15,000 to get the company started, with the funds to come from Pinehurst. Nichols constantly checked on Doran and traveled to Jackson to determine how he was doing his job.

The advertising campaign was kicked off with ads in newspapers across the state, promising high interest returns for

money placed with Jackson Mortgage. Inquiries began coming in from the public. A solicitation letter,[1] drafted by Boswell, was mailed in response to those

1. Jackson Mortgage and Loan Inc.

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1755 LELIA DRIVE JACKSON, MISSISSIPPI 39216 / TELEPHONE 981-1745

Date

Name
Street
City

Dear

Jackson Mortgage and Loan is a Mississippi financial institution which provides short-term capital for sound commercial, industrial and residential properties. Though not federally insured funds invested in Jackson Mortgage and Loan have a high safety factor because the bulk of the collateral for mortgage loans is Prime Real Estate. All the directors of Jackson Mortgage and Loan are or have been active in the field of Real Estate and bring a total of more than 40 years" experience in the financing and development of Real Estate.

The new series of Jackson Mortgage and Loan investment notes earn 9.5% interest compounded daily, which is an actual income rate of 9.96% per annum. The 1974 series of investment notes are issued in $50.00 units and are redeemable after 12 months. For example, after 12 months' maturity a $500.00 note earns $49.80; a $1000.00 note earns $99.60; a $5000.00 note earns $498.00. Thirty (30) days prior to the maturity of the 12 month investment notes, investors will be notified by mail to inform them, that their investment notes are due to mature, at which time the principal and the interest will be sent to the investor. We would hope at that time the investor would choose to invest further with Jackson Mortgage and Loan, Inc. It is the opinion of Jackson Mortgage and Loan's certified public accountants that there will be no income tax liability until the note matures and pays interest even though the interest is compounded daily. Thus, the 1974 series of notes will not mature until 1975 and tax will not be due until 1976.

Jackson Mortgage and Loan's Demand Investment Notes earn 8.5% compounded daily. Minimum investment is $50.00. There is a fifteen (15) day waiting period on redemption of demand notes if redeemed prior to date of maturity.

The mailing address of Jackson Mortgage and Loan is:
1755 Lelia Drive
Suite 402
Jackson, Mississippi 39216

Please drop by or call if we may be of further help.

Sincerely yours,

RED/sp

Robert E. Dorsn
President

Enclosures

inquiries. The solicitations were confined to Mississippi so that Jackson Mortgage would not violate federal securities laws. The letter described the company, what the investor's money would be used for, and the expected rate of return on the various investments. This letter had several false statements, such as claiming Jackson Mortgage had provided short-term capital for sound real property investment, claiming Jackson Mortgage had made mortgage loans on real estate, claiming the directors had more than forty years experience, and implying that Jackson Mortgage had certified public accountants.

The money started coming in, but none was invested in real estate and mortgage loans. The promoters began draining the money off for payment of their salaries and other purposes. The Secretary of State stepped in, closed down Jackson Mortgage, and put it into receivership.

This culminated in Boswell, Herndon, and Nichols being indicted by the United States grand jury on one count of mail fraud and one count of conspiracy to commit both mail fraud and fraud by wire, 18 U.S.C. § 371 and § 1341 (1970). Boswell was also indicted on one count of fraud by wire, 18 U.S.C. § 1343 (1970). Doran was not indicted and became the crucial witness for the government.

The trial jury convicted all defendants on all counts. Nichols was sentenced to five years in prison, with four years probation after his release. Boswell and Herndon were sentenced to eighteen months, with three years of inactive probation subsequent to release. A condition of Boswell's probation was that he make full restitution to all who had deposited funds in Jackson Mortgage.

Appropriate motions for judgments of acquittal were denied. The appellants argue that this action was erroneous because the evidence did not support the allegations of the indictment. On the statements of facts hereinabove appearing, these contentions are bereft of merit, see *United States v. Kohlmann*, 5 Cir., 1974, 491 F.2d 1250, 1253; *Stephens v. United States*, 5 Cir., 1965, 354 F.2d 999.

[1] The next assignment of error is grounded upon a rarely encountered occurrence. After the close of the evidence, the trial at that point having lasted five days, the trial judge became ill. He inquired of all trial counsel if there were any objections to allowing the magistrate to sit during the scheduled four hours of argument to the jury, so as to avoid delaying the trial. The defendants were not informed by the Court of their right under the Rule to have a judge preside over the argument and, of course, they did not personally say that they would waive that right. The attorneys, however, stated that there was no objection. The magistrate introduced himself to the jury and explained the reason for his presiding in the absence of the judge. The defense offered no objection at that point or at any other time until after the guilty verdicts were returned. At the close of argument the judge was able to take the bench and to instruct the jury, thereafter presiding for the remainder of the trial.

The defendants correctly argue that the substitution of the magistrate did not comply with the mandate of Rule 25(a) of the Federal Rules of Criminal Procedure:

> "If by reason of death, sickness or other disability the judge before whom a jury trial has commenced is unable to proceed with the trial, any other judge regularly sitting in or assigned to the court, upon certifying that he has familiarized himself with the rec-

ord of the trial may proceed with and finish the trial."

The defendants say, and it is no doubt so, that the magistrate was neither a "judge regularly sitting in or assigned to the court" nor familiar with the record of the trial.

The defendants seek to expand this into a constitutional issue: that the Sixth Amendment right to trial by jury includes the right to have a statutorily competent judicial officer try the case, relying on *Capital Traction Company v. Hof*, 174 U.S. 1, 13, 14, 19 S.Ct. 580, 585, 43 L.Ed. 873 (1899):

> "'Trial by jury,' in the primary and usual sense of the term at the common law and in the American constitutions, is not merely a trial by a jury of twelve men before an officer vested with authority to cause them to be summoned and empaneled, to administer oaths to them and to the constable in charge, and to enter judgment and issue execution on their verdict; but it is a trial by a jury of twelve men, *in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts*, and (except on acquittal of a criminal charge) to set aside their verdict if in his opinion it is against the law or the evidence. This proposition has been so generally admitted, and so seldom contested, that there has been little occasion for its distinct assertion. Yet there are unequivocal statements of it to be found in the books." (Emphasis added).

The argument further contends that the waiver by counsel was insufficient because only "express and intelligent consent of the defendant" can constitute a waiver of a constitutional right, *Patton v. United States*, 281 U.S. 276, 312, 313, 50 S.Ct. 253, 263, 74 L.Ed. 854 (1930); *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938).

There was only a handful of objections raised during oral argument. Chiefly, those objections were to the effect that the prosecutor was misquoting testimony. In response to this, the magistrate informed the jury that he had not heard the evidence and was not in position to pass on the accuracy or inaccuracy of the prosecutor's assertions. The jurors were informed that they had heard the testimony and that they were the judges of whether or not it had been accurately quoted. Without deciding whether the occurrence was an invasion of a constitutionally guaranteed right, and without deciding whether the defendants were required in the circumstances to *personally* enter an intelligent waiver, our evaluation of the record is that they could not have been prejudiced by what took place. Viewed in the context of five days of testimony, these disputes as to what a particular witness had said, or not said, could not have misled the jury because the jurors had heard the testimony and had the benefit of their own recollections on that subject.

Haith v. United States, 3 Cir., 1965, 342 F.2d 158, was a case in which the presence of a trial judge during the selection of the jury had been "impliedly waived" by defense attorneys. Nothing prejudicial to the substantial rights of the defendants was shown. The Court refused to set aside the conviction.

We find nothing prejudicial in the situation now under consideration. We do not intend to leave the impression that we look with approval upon a failure to conform to Rule 25(a). Our decision applies to this case only, and to what actually happened here. We must hold that beyond a reasonable doubt lack of conformity in this instance was harmless error.

The Dispute Concerning Restitution

[2, 3] The sentence unconditionally imposed on Boswell as to Count 1 was he should serve eighteen months in the custody of the Attorney General. As to Count 2, imposition of sentence was suspended and Boswell was placed on inactive probation for a period of three years after release from confinement on the sentence imposed on Count 1. As to Count 3, imposition of sentence was also suspended and the defendant was placed on inactive probation for three years after release from confinement on Count 1, to run concurrently with the probation imposed on Count 2.

As a special condition of probation on Counts 2 and 3 the Court ordered at first that Boswell should "pay within sixty days to the United States Probation Officer as Trustee to be held in trust the full amount invested with Jackson Mortgage and Loan Company, Inc., by all investors, *as determined to be due by the United States Probation Officer* (emphasis added)". Boswell moved to vacate the order because it would have the probation officer make a judicial determination he was not qualified to make and because it did not give Boswell credit for funds in the hands of the state receiver. At that point, however, it could not be known what, if anything, would be distributed to the investors. The state receivership was still in progress and the receiver had $26,910.64 in cash.

At the second hearing the parties stipulated that the loss to the investors amounted to $71,140.99. The Court then ordered Boswell to pay that sum to the probation officer within ten days of July 1, 1976, "to be held in trust until such time as there has been a final determination of this matter and which the probation officer shall hold on deposit at Unifirst Federal Savings and Loan Association at the highest current interest". It is unmistakably clear from the record as a whole that the Court intended that if Boswell was to receive probation on Counts 2 and 3 all the money lost by the defrauded investors was to be recovered by July 10, 1976. It, however, did not order that the money be immediately distributed to them. That might have made it difficult if not impossible for Boswell to retrieve any portion for which he was entitled to credit. The money was to be held under the control of the Court until such time "as there has been a final determination of this matter", an event to be anticipated when it became known how much, if anything, the state receiver had recovered for the depositors from the net proceeds of the receivership. While the order does not say so, the District Court obviously intended that on "final determination" Boswell would be refunded an amount equal to that recovered by the receiver.

On July 21, 1976, a panel of this Court stayed the restitution order until the outcome of this appeal.

As a condition of probation a district court undoubtedly has the authority to require that a defendant make restitution to injured parties for *actual* loss or damage caused by the offense for which he stands convicted, 18 U.S.C. § 3651 (1970); *United States v. Savage*, 5 Cir., 1971, 440 F.2d 1237, 1239; *United States v. Mancuso*, 5 Cir., 1971, 444 F.2d 691.

Since 18 U.S.C. § 3651 authorizes a requirement that a defendant make good only actual losses, and since the state receivership has been in progress for approximately sixteen months since our stay order, we are of the opinion that as to Counts 2 and 3 only, the case should be remanded to the District Court for resentencing so that the condition imposed for restitution may be expresly

stated in terms of *actual loss* to the defrauded depositors. Boswell's unconditional sentence on Count 1 will be effective on receipt of our mandate.

[4] The appellants also urge that the trial judge committed error when he refused to instruct the jury that good faith was a defense to each count of the indictment, as requested by Requests to Charge numbered 10, 13, and 23. In a different factual situation this point would require critical examination. See, e. g., *Durland v. United States*, 161 U.S. 306, 16 S.Ct. 508, 40 L.Ed. 709 (1896); *Kroll v. United States*, 5 Cir., 1970, 433 F.2d 1282; *United States v. Diamond*, 5 Cir., 1970, 430 F.2d 688.

But the defendant's evidence at trial as to good faith went only to conduct in the formation and operation of Pinehurst Mortgage and Loan Company, whereas the indictment charged fraud solely with respect to the operation of Jackson Mortgage and Loan Company. Appellants only "were entitled to appropriate instructions as to such defense *if the evidence warrants*", (emphasis added), *United States v. Diamond, supra*, 430 F.2d at 692. Such was clearly not the case here.

We feel no compulsion, therefore, to determine whether the requested charges correctly framed what was simply in the circumstances an abstract legal proposition.

Boswell's conviction on Count 1 is AFFIRMED.

Boswell's convictions on Counts 2 and 3 are AFFIRMED and REMANDED for further proceedings not inconsistent herewith.

The convictions of Emmett Howard Herndon and David Rule Nichols are AFFIRMED.

TJOFLAT, Circuit Judge (concurring specially):

Although I agree with the majority's result, I feel that the analysis in this case requires clarification. By implication the majority, despite its disclaimer that it has not decided the constitutional issue, has determined that the right to the presence of the trial judge during closing argument in this case was not fundamental to a fair trial. This determination is necessarily subsumed in the majority's analysis because if the right were fundamental to a fair trial here, then any error, no matter how negligible, would require reversal of Boswell's conviction. As stated in *Chapman v. California*, 386 U.S. 18, 23, 87 S.Ct. 824, 827–28, 17 L.Ed.2d 705 (1967), "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." I agree with the majority's implied finding that substitution of the magistrate during closing argument did not so infringe Boswell's substantial rights as to require an outright reversal as a matter of law.

I would go beyond the majority's determination that the trial judge's absence in this case was not prejudicial and hold that it was harmless beyond a reasonable doubt. It is my understanding that *Chapman* and its progeny require this stringent standard, rather than the more lenient lack-of-prejudice standard used by the majority, when constitutional error has occurred in a trial. My determination that the error here was harmless beyond a reasonable doubt obviates the necessity of reaching the issue whether the requirement of the trial judge's presence during final argument to the jury is a right of constitutional dimension.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 76-1843

D. C. Docket No. CR-J75-53(C)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FREDERICK NEWELL BOSWELL,
DAVID RULE NICHOLS and
EMMETT HOWARD HERNDON,

Defendants-Appellants.

Appeals from the United States District Court for the
Southern District of Mississippi

Before COLEMAN, SIMPSON and TJOFLAT, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Mississippi, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgmentsof the said District Court in this cause be, and the same are hereby, affirmed as to Emmett Howard Herndon and David Rule Nichols and as to Frederick Newell Boswell on Count 1; Boswell's convictions on Counts 2 and 3 are affirmed and remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court.

January 12, 1978

TJOFLAT, Circuit Judge, concurring specially.

ISSUED AS MANDATE: FEB 23 1978

APPENDIX C

United States Court of Appeals

FIFTH CIRCUIT

EDWARD W. WADSWORTH
CLERK

OFFICE OF THE CLERK

TEL 504-589-6514
600 CAMP STREET
NEW ORLEANS, LA. 70130

February 15, 1978

TO ALL PARTIES LISTED BELOW:

NO. 76-1843 - U.S.A. v. FREDERICK NEWELL BOSWELL, ET AL.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition(S) for rehearing,** and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By Brenda M. Hauch
Deputy Clerk

**on behalf of appellants,

bmh

cc: Messrs. Edward T. M. Garland
Frank Joseph Petrella
Mr. Sam Johnson
Mr. L. Breland Hilburn
Messrs. James B. Tucker
Robert E. Hauberg

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

UNITED STATES OF AMERICA

VS. CRIMINAL NO. J75-53(C)

FREDERICK NEWELL BOSWELL,
EMMETT HOWARD HERNDON and
DAVID RULE NICHOLS

ORDER WITHDRAWING SURRENDER ORDER

This day this cause came on to be heard and it appearing to the Court that the appeal of Frederick Newell Boswell was affirmed by the Court of Appeals for the Fifth Circuit and that through inadvertence, the attorney for Frederick Newell Boswell, was not notified of the affirmance or the Surrender Order issued by this Court and has now on file a Petition to Stay the Mandate and was scheduled to have a hearing before Honorable J. P. Coleman, Judge of the Court of Appeals, but that due to a death in his family, said hearing has been rescheduled;

It further appearing to the Court that a Surrender Order was issued requiring the Appellant and Defendant below to surrender to a United States Marshal on March 20, 1978, and due to the circumstances, the Surrender Order issued by this Court is hereby stayed until further order.

SO ORDERED this the 14th day of March, 1978.

s/ Harold [illegible]

UNITED STATES DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 76-1843

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FREDERICK NEWELL BOSWELL,
DAVID RULE NICHOLS and
EMMETT HOWARD HERNDON,

Defendants-Appellants.

- - - - -

Appeals from the United States District Court for the Southern District of Mississippi

- - - - -

O R D E R:

( ) The motion of _____ for recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED. See Fifth Circuit Local Rule 15, as amended January 11, 1972.

(X) The motion of appellant, FREDERICK NEWELL BOSWELL for recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including April 15, 1978, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

Jas. P. Coleman
UNITED STATES CIRCUIT JUDGE

CERTIFICATE OF SERVICE

This is to certify that two (2) true and correct copies of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit were this date served on the attorney of record for Respondent, and on the Solicitor General, pursuant to Rule 33(1) and (2)(a) of the Rules of the Supreme Court of the United States, by depositing two (2) copies of same in the United States Mail, postage prepaid, addressed to:

James B. Tucker, Esquire
United States Attorney
United States District Courthouse
for the Southern District of Mississippi
Jackson, Mississippi

The Solicitor General
Department of Justice
Washington, D. C. 20530

This the 14th day of April, 1978.

VAN CAMP, GILL & CRUMPLER, P. A.
Attorneys for Petitioner

BY: _____
James R. Van Camp
Post Office Drawer 1438
Southern Pines, N. C. 28387
(919) 692-2622

No. 77-1466

In the Supreme Court of the United States

OCTOBER TERM, 1977

FREDERICK N. BOSWELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

JOHN C. KEENEY,
Acting Assistant Attorney General,

SIDNEY GLAZER,
PATTY E. MERKAMP,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1466

FREDERICK N. BOSWELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 565 F. 2d 1338.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 1978, and a petition for rehearing with suggestion for rehearing *en banc* was denied on February 15, 1978. The petition for a writ of certiorari was filed on April 14, 1978, and is therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the substitution of a federal magistrate for a district court judge during closing arguments to the jury violated petitioner's constitutional right to a trial by jury

and requires reversal of petitioner's conviction even though petitioner consented to the substitution and has made no showing of any prejudice resulting from it.

STATEMENT

After a jury trial in the United States District Court for the Southern District of Mississippi, petitioner was convicted of conspiracy to commit mail and wire fraud (Count I), mail fraud (Count II), and fraud by wire (Count III), in violation of 18 U.S.C. 371, 1341, and 1343. He was sentenced to imprisonment for 18 months on Count I; on Counts II and III, his sentence was suspended and he was placed on probation for three years to begin after his release from confinement on Count I. As a special condition of his probation, petitioner was ordered to make restitution of the amounts he defrauded from the victims of his crimes. The court of appeals affirmed.[1]

1. The evidence at trial showed that petitioner and three others—doing business as Jackson Mortgage and Loan, Inc.—solicited investments in their mortgage company by offering promissory notes bearing a high interest rate.[2] They falsely represented to the investors

[1]The district court conditioned petitioner's probationary sentence on his repayment of the full amount others had invested in petitioner's fraudulent mortgage company scheme. The court of appeals reversed this part of petitioner's sentence, and remanded with instructions that petitioner not be required to pay more than the actual loss suffered by the investors (Pet. App. 1549-1550). This aspect of the decision below is not challenged in this petition (Pet. 7).

[2]Two of petitioner's co-defendants, Emmett Herndon and David Nichols, were also convicted on the mail fraud and conspiracy counts. Nichols was sentenced to five years in prison on Count I; on Count II, his sentence was suspended and he was placed on four years of probation to begin after his release from confinement on Count I. Herndon was sentenced to 18 months in prison on Count I; on Count II, his sentence was suspended and he was placed on three years of probation to begin after his release from confinement on Count I. Robert Doran was named in the indictment as an unindicted co-conspirator and testified as a government witness at trial (Pet. App. 1547).

that the money would be reinvested in mortgage loans on prime real estate, that the directors of Jackson Mortgage had more than 40 years of experience in the financing and development of real estate, and that Jackson Mortgage had certified public accountants in its employ. Contrary to these representations, however, the money received from the sale of the promissory notes was not invested in real estate but was diverted by petitioner and his co-defendants for their personal use (Pet. App. 1545-1547).

2. At the completion of the fifth day of trial, as closing arguments were ready to begin, the judge became ill and was unable to continue with the trial. At the suggestion of the trial court, and "[b]y stipulation of the parties and agreement of counsel," a federal magistrate replaced the judge during closing arguments (III Tr. 514-515). After the arguments were completed, the trial judge returned to the bench, delivered his charge to the jury, and received the verdict. Petitioner did not object either before, during, or immediately after closing argument to the temporary substitution of the magistrate for the judge (III Tr. 678).

In a motion for a new trial following conviction, however, petitioner raised the claim that the district court erred in allowing the magistrate to supervise the closing arguments. The district court denied the motion, and the court of appeals affirmed. The court of appeals held that the substitution of the magistrate was not in conformance with Rule 25(a) of the Federal Rules of Criminal Procedure because the magistrate was not a "judge

regularly sitting in or assigned to the court" and because the magistrate had not "familiarized himself with the record of the trial" as required by that Rule.[3] The court of appeals determined, however, that it was unnecessary to decide whether the violation of Rule 25 was also an invasion of petitioner's constitutional right to a trial by jury. Since petitioner had failed to show that he was in any way prejudiced by the substitution of the magistrate at the closing argument, the court held that the error claimed by petitioner was harmless beyond a reasonable doubt and affirmed the convictions (Pet. App. 1548).[4]

ARGUMENT

1. Petitioner contends that the supervision of the closing argument by the magistrate violated his constitutional right to a trial by jury. In making this claim, petitioner does not argue that the Constitution requires in every case that a judge, rather than a magistrate, supervise the closing argument at criminal trials (Pet. 9).[5] Petitioner claims instead that the constitutional right to a jury trial is violated when any person authorized to preside at criminal trials has not familiarized himself with the record before assuming duties at the trial (Pet. 9-10).

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[3]Rule 25(a) of the Federal Rules of Criminal Procedure provides:

> If by reason of death, sickness or other disability the judge before whom a jury trial has commenced is unable to proceed with the trial, any other judge regularly sitting in or assigned to the court, upon certifying that he has familiarized himself with the record of the trial, may proceed with and finish the trial.

[4]The court of appeals did not decide whether petitioner made an express and intelligent waiver of his claimed constitutional right (Pet. App. 1548).

[5]Petitioner seems to concede that, in some circumstances, a magistrate may be constitutionally authorized to participate in criminal trials (Pet. 9).

Petitioner's claim is not substantial. In the first place, the Constitution does not require that "every federal question arising under the federal law, or even every criminal prosecution for violating an Act of Congress, * * * be tried in an Art. III court before a judge enjoying lifetime tenure and protection against salary reduction." *Palmore* v. *United States*, 411 U.S. 389, 407. The Federal Magistrates Act, 28 U.S.C. 631 *et seq.*, reflects the absence of any constitutional impediment to the service of federal magistrates in criminal cases by permitting district courts to authorize magistrates to conduct pre-trial and post-trial criminal proceedings, 28 U.S.C. 636(b)(2),(3), and by authorizing magistrates to try federal misdemeanor offenses pursuant to 18 U.S.C. 3401, see 28 U.S.C. 636(a)(3).[6]

Moreover, there is no support in the cases on which petitioner relies for the proposition that the constitutional right to a jury trial requires that the judge or magistrate supervising the closing argument has "familiarized himself with the record of the prior trial proceedings" (Pet. 10). The requirement to which petitioner refers is established by Rule 25(a) of the Federal Rules of Criminal Procedure, see note 3, *supra*. There is no suggestion in the Notes of the Advisory Committee on Rules that this requirement is compelled by the constitutional right to a jury trial.[7] Furthermore, the requirement of Rule 25 applies, by its own terms, when the substitute judge is to assume

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[6]Under 18 U.S.C. 3401(b), a misdemeanor defendant may elect to be tried before a district judge instead of the magistrate. Furthermore, since the magistrate sits without a jury under 18 U.S.C. 3401(a), the defendant must expressly waive his right to a jury trial. 18 U.S.C. 3401(b).

[7]The Notes state only that Rule 25 is derived from Rule 63 of the Federal Rules of Civil Procedure, 18 U.S.C. Appendix.

authority to try the case to its completion; the rule does not strictly apply to a case such as the present one where only the temporary and limited duty of supervising the closing argument is involved. See note 3, *supra*.

The case of *Capital Traction Co.* v . *Hof*, 174 U.S. 1—on which petitioner relies (Pet. 10)—is inapposite. That case states only that the Seventh Amendment right to a jury trial in civil cases includes the right to have the trial supervised by a judge empowered to instruct and advise the jury. See 174 U.S. at 13-14. As the court held in *Palmore* v. *United States*, *supra*, 411 U.S. at 407, there is no constitutional requirement that criminal trials be entirely conducted in all cases before Article III judges, and there is thus no constitutional obstacle to the limited participation of the federal magistrate in supervising the closing argument in this case.

Finally, even if petitioner possessed the constitutional right that he asserts here, petitioner freely chose not to delay the trial and agreed to proceed under the supervision of the magistrate. At the beginning of the closing argument, the magistrate recited the "stipulation of the parties and agreement of counsel" (III Tr. 514-515) to allow the magistrate to replace the judge during the arguments. Even under the standard of *Johnson* v. *Zerbst*, 304 U.S. 458, 464, this stipulation, entered with petitioner's participation and in his presence, constituted an intentional waiver of petitioner's known rights. More importantly, however, the decision to proceed under the magistrate's supervision was one of "the vast array of trial decisions, strategic and tactical," which counsel make, with the accused's participation, in criminal trials. See *Estelle* v. *Williams*, 425 U.S. 501, 512. Petitioner's failure to object to the substitution of the magistrate at the closing arguments is therefore alone sufficient to preclude him from raising the claim at this time. *Id.* at 512-513.

2. Even if it is assumed that the right petitioner asserts is of constitutional magnitude, and that he did not validly waive that right by stipulating to the substitution of the magistrate, the right to have the trial judge supervise the closing argument is not so fundamental to a fair trial that a violation of the right requires reversal of the conviction even though no prejudice has occurred. *Heflin* v. *United States*, 125 F. 2d 700 (C.A. 5) (judge absent during defense counsel's argument to the jury); see *United States* v. *Pfingst*, 477 F. 2d 177, 197 (C.A. 2), certiorari denied, 412 U.S. 941 (judge absent during jury deliberations); *Haith* v. *United States*, 342 F. 2d 158, 159 (C.A. 3) (judge absent during jury *voir dire*). The court of appeals correctly found in this case that the error alleged by petitioner was harmless beyond a reasonable doubt (Pet. App. 1548). Petitioner notes that defense counsel entered several objections to the manner in which the prosecutor reviewed the evidence on his closing argument (Pet. 5), but petitioner does not now claim that the government's closing argument was inaccurate, prejudicial or contained reversible error. In response to each objection, the magistrate ordered the prosecutor to confine his argument to the evidence presented or permitted defense counsel to correct the alleged misstatement (III Tr. 543, 638, 640, 656, 663-665, 669, 674-675). The magistrate informed the jury that they, and not the attorneys, were the ultimate factfinders (III Tr. 666). The trial judge emphasized this again during his instructions to the jury (Tr. III 678-680). Under these circumstances, as the court of appeals held, the magistrate's supervision, if error, was harmless beyond a reasonable doubt.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

JOHN C. KEENEY,
Acting Assistant Attorney General.

SIDNEY GLAZER,
PATTY E. MERKAMP,
Attorneys.

JUNE 1978.

DOJ-1978-06